STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 23, 2007
v	No. 267297 Oakland Circuit Court
JAMES MICHAEL MCCLAIN, Defendant-Appellant.	LC No. 2004-199764-FC

Before: Donofrio, P.J., and Bandstra and Zahra, JJ.

PER CURIAM.

Defendant was convicted by a jury of possession with intent to deliver 1,000 or more grams of cocaine, MCL 333.7401(2)(a)(i), delivery of 450 or more but less than 1,000 grams of cocaine, MCL 333.7401(2)(a)(ii), and two counts of delivery of 50 or more but less than 450 grams of cocaine, MCL 333.7401(2)(a)(iii).[1] He was sentenced as an habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of 25 to 60 years for each offense. He appeals as of right. We affirm defendant's convictions, but remand for resentencing.

I. Basic Facts and Procedure

In conjunction with law enforcement, Marty Mendieta, a drug dealer, arranged three drug transactions with Tim Lindeberg. The first deal commenced on March 1, 2004. Mendieta solicited 4 ½ ounces of cocaine from Lindeberg, who contacted Jerry Mason, and Mason called defendant. Mason testified that he had bought from and sold drugs to defendant in the past. Mason and Lindeberg met defendant at a carwash, and a female in defendant's car handed Mason a bag of cocaine. On the following day, Mendieta paid Mason and Lindeberg $3,500 in

[1] This was defendant's second trial. In an earlier trial, defendant was convicted of additional counts of conspiracy to deliver or possess with intent to deliver 450 or more but less than 1,000 grams of cocaine, MCL 750.157a and MCL 333.7401(2)(a)(ii), and possession of marijuana, MCL 333.7403(2)(d), but acquitted of two counts of possession of a firearm during the commission of a felony, MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. The jury was unable to reach a verdict on the remaining four charges, so defendant was retried on those charges in this case.

prerecorded funds for the cocaine. Subsequently, Mason went to a residence located at 26 Sanford in Pontiac and gave defendant $3,000 for the cocaine.

On March 9, 2004, Mendieta again asked Lindeberg for 4-1/2 ounces of cocaine. Lindeberg contacted Mason, and Mason again called defendant. Mason and Lindeberg later retrieved the cocaine from defendant at a carwash. Mason and Lindeberg gave the cocaine to Mendieta at Lindeberg's house in Independence County, and Mendieta paid $3,500. After the exchange, Mason called defendant, who arranged for Mason to pay for the cocaine at a house on Rockwell Street.

The third transaction occurred on March 15, 2004, and involved Mendieta purchasing 1/2-kilogram of cocaine from Lindeberg for $14,500. Mason testified that, after speaking with Lindeberg, he contacted defendant. Defendant eventually told Mason to meet him at the Sanford residence. When Mason walked in the house, an unidentified man pointed to the cocaine in the kitchen sink, and Mason briefly spoke with defendant before leaving. Lindeberg delivered the cocaine to Mendieta.

On March 15, 2004, police went to 26 Sanford to execute a search warrant and, after announcing their presence and receiving no response, they effectuated a forced entry. Once inside the house, officers noticed that lights were on and food was cooking on the stove, but no one was in the house. The police ultimately seized 1,233 grams of cocaine, nearly a pound of marijuana, a handgun, proofs of residency for defendant and his wife, $18,075, and a taser gun. Prerecorded bills from the earlier drug buys were among the money confiscated from the residence. Officers also executed a search warrant at 227 Rockwell, and found a Nextel bill for defendant, sandwich baggies, and a digital scale. Defendant's Nextel bill showed phone calls made between March 2, 2004, and March 15, 2004, to a cell phone used by Mason. Detective Perry Dare, an expert in drug trafficking, testified that the Rockwell residence was a "party house" and that no food or beds were in the house.

Defendant's wife testified that she lived at the Sanford house, but that defendant did not live there because they were separated. She claimed that defendant was not at the Sanford house on March 2, 2004, March 9, 2004, or March 15, 2004. She denied any awareness of the drugs or money found in the house.

II. Motion to Suppress Evidence

Defendant first argues that the trial court erred in denying his motion to suppress evidence seized at 26 Sanford. When considering a ruling on a motion to suppress evidence, we review the trial court's findings of fact for clear error, giving deference to the trial court's resolution of factual issues. *People v Bolduc*, 263 Mich App 430, 436; 688 NW2d 316 (2004), lv den 472 Mich 868, cert den ___ US ___; 126 S Ct 415; 163 L Ed 2d 317 (2005). "A finding of fact is clearly erroneous if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made." *Id.* We may not substitute our judgment for that of the trial court or make independent findings. *Id.* However, we review de novo the trial court's application of law to its factual findings. *Id.*

The Fourth Amendment of the United States Constitution and Const 1963, art 1, § 11, guarantee the right of persons to be secure against unreasonable searches and seizures. *People v*

Kazmierczak, 461 Mich 411, 417; 605 NW2d 667 (2000). A search conducted without a warrant generally qualifies as unreasonable unless both probable cause and circumstances establishing an exception to the warrant requirement exist. *People v Snider*, 239 Mich App 393, 407; 608 NW2d 502 (2000), lv den 463 Mich 855 (2000). Generally, materials seized and observations made during an unconstitutional search may not be introduced into evidence. *People v Hawkins*, 468 Mich 488, 498-499; 668 NW2d 602 (2003).

Defendant maintains police did not have a warrant to enter the premises, entered the premises illegally and obtained a warrant only after finding narcotics on the premises. After defendant's first trial but before commencement of his second trial, defense counsel obtained a letter from the criminal department supervisor at the Clarkston District Court. The correspondence indicates that the court "was never in receipt" of a search warrant for 26 Sanford. Defendant filed a motion to stay proceedings pending appeal, and to suppress the evidence. At a hearing, defendant argued that the evidence seized from 26 Sanford should be suppressed because there was no record of any search warrant in the Clarkston District Court. The prosecutor argued that warrants are not jurisdictional in that any judge in the State can sign a warrant. The prosecutor noted that no criminal proceeding relating to this matter was ever assigned to the Clarkston District Court, that the preliminary examination was held in the Waterford District Court, and that the warrants could have been filed in the courts in Waterford or Pontiac, given the facts of this case.

Further, the proofs established that Oakland County Sheriff Detective Sergeant Brent Miles of the Narcotics Enforcement Team was the affiant for two search warrants for 26 Sanford. Detective Sergeant Miles testified that he typed the two search warrants, put the probable cause information into an affidavit supporting the warrants, appeared before a judge, and swore to all the facts. Sergeant Miles explained that the first warrant was for records. Detective Sergeant Miles testified that when he received communication from the officers at 26 Sanford that narcotics were found, he advised the officers on the scene to stop the search and wait until he obtained a second warrant for the narcotics. Detective Sergeant Miles testified that a judge signed a second warrant, and he communicated that fact to the officers on the scene.

Defendant maintains there is a "problem" with the prosecutor's claim that there were two warrants issued to search 26 Sanford. Defendant asserts, "the first warrant provided that controlled substances, particularly cocaine, could be seized." To that end, defendant cites ¶ 7 of the first warrant, and claims that "the purported second warrant would not have been sought if the purported first warrant had actually existed at the time of entry."

Contrary to what defendant argues, ¶ 7 did not authorize the seizure of narcotics. Instead, ¶ 7 authorized the seizure of

> *[p]hotographs, videotapes*, in particular, *photographs* of co-conspirators, of assets and/or controlled substances, in particular cocaine. [Emphasis added.]

The second warrant added the following language:

> 15. Cocaine and any raw material, product, equipment or drug paraphernalia for the compounding, cutting, exporting, importing, manufacturing, packaging, processing, storage use or weighing of any controlled substances.

On this record, we cannot find that the trial court's decision to deny defendant's motion to suppress is clearly erroneous. Although defendant presented evidence that the warrants were not filed in the Clarkston District Court, the mere fact that there is no record of the warrants in that court is not conclusive. The prosecution presented evidence of two facially valid search warrants containing a judge's signature. Three police officers testified regarding the existence of the document search warrant, and the later issuance of a second search warrant allowing the seizure of narcotics. Detective Sergeant Miles testified that he authored the affidavits and warrants and obtained a judge's signature on both warrants.

Additionally, implicit in defendant's argument is a claim that the judicial signature on one or both warrants was forged. But apart from conjecture, defendant did not present any evidence challenging the authenticity of the signatures. Defense counsel did not present the warrants to the judge to determine if she actually signed them and did not seek an evidentiary hearing regarding this matter.

Simply put, defendant did not present any evidence that either of the search warrants was invalid or bogus. As the appellant, "[d]efendant may not leave it to this Court to search for a factual basis to sustain or reject his position." *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001), lv den 465 Mich 914 (2001). Consequently, we are not left with a definite and firm conviction that a mistake was made.

III. *Batson* Challenge

Defendant, an African-American male, also argues that he was denied his constitutional right to an impartial jury when the prosecutor used two peremptory challenges to strike African-American jurors, contrary to *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986). This Court reviews a trial court's ruling regarding a *Batson* challenge for an abuse of discretion. *Harville v State Plumbing & Heating, Inc*, 218 Mich App 302, 319-320; 553 NW2d 377 (1996), lv den 456 Mich 960 (1998). This Court gives great deference to the trial court's findings "because they turn in large part on credibility." *Id*. at 320.

The Equal Protection Clause guarantees to a defendant a jury whose members are selected by nondiscriminatory methods. *Batson, supra* at 85-86. In *Batson,* the United States Supreme Court held that the Equal Protection Clause prohibits a prosecutor from using peremptory challenges to strike jurors solely on the basis of race. The burden initially is on the defendant to make out a prima facie case of purposeful discrimination. *Id.* at 93-94. In deciding whether the defendant has made a requisite showing of purposeful discrimination, a court must consider all relevant circumstances, including whether there is a pattern of strikes against a class of jurors, and the questions and statements made by the prosecutor during voir dire and in exercising his challenges. *Id.* at 97. If a defendant makes such a prima facie showing of a discriminatory purpose the burden shifts to the prosecutor, who must articulate a racially neutral explanation for challenging the jurors. *Id.* at 97-98.

Here, defendant failed to establish purposeful discrimination. Defendant essentially argues that, because two African-American jurors were removed by peremptory challenge, the prosecutor's removals indicate a pattern of discrimination. But the mere fact that a party uses one or more peremptory challenges to excuse minority members from a jury venire is insufficient to establish a prima facie showing of discrimination. *Clarke v Kmart Corp*, 220 Mich App 381,

383; 559 NW2d 377 (1996), lv den 456 Mich 887 (1997); *People v Williams*, 174 Mich App 132, 137; 435 NW2d 469 (1989). Additionally, defendant acknowledges that an African-American juror remained on the jury, which militates against a finding of purposeful discrimination.[2] *Id.*

IV. Sufficiency of the Evidence

Defendant argues that there was insufficient evidence to sustain his convictions. When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996), lv den 455 Mich 870 (1997). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997), lv den 458 Mich 870 (1998).

Defendant argues that Mason and Lindeberg were not credible because they had pleaded guilty, but had not been sentenced, and were motivated to testify falsely because of their own self-interests. Defendant's argument fails because it calls upon this Court to resolve credibility issues anew on appeal. It is well established that this Court will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses. *Wolfe, supra* at 514. See also *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998) ("absent exceptional circumstances, issues of witness credibility are for the jury, and the trial court may not substitute its view of the credibility 'for the constitutionally guaranteed jury determination thereof.'").

Moreover, the jurors were aware of Mason's and Lindeberg's parts in the three drug transactions, their guilty pleas, and the fact that neither had been sentenced at the time of defendant's trial. Additionally, there was evidence that corroborated Mason's and Lindeberg's testimony. For example, phone records supported Mason's testimony that he arranged the three drug deals with defendant over the telephone. Prerecorded bills from the earlier drug transactions were among the money confiscated from defendant's residence. Police officers testified about their surveillance of the drug transactions and their observations of defendant, Mason, and Lindeberg. Further, more than 1,000 grams of cocaine, and more than $18,000 were found in defendant's residence. This evidence corroborated Mason's and Lindeberg's testimony

[2] The prosecutor provided race-neutral reasons for excusing the two African-American jurors. The first juror was removed because she was an administrative law judge, and had previously worked as a public defender and with another "defense-oriented group." The prosecutor explained that the second juror was removed because "every time [the prosecutor] or even other jurors spoke [the juror] was continually rolling her eyes and making facial expressions that indicated her disgust or a distaste for [the prosecutor]." Unless a discriminatory intent is "inherent in the reason offered, which does not have to be persuasive or even plausible, the reason will be deemed race-neutral." *Purkett v Elem*, 514 US 765, 767-768; 115 S Ct 1769; 131 L Ed 2d 834 (1995), reh den 515 US 1170; 115 S Ct 2635; 132 L Ed 2d 874 (1995).

that defendant was involved in drug trafficking. Viewed in a light most favorable to the prosecution, the evidence was sufficient to sustain defendant's convictions.

V. Sentence

Defendant argues that he is entitled to be resentenced because he was improperly sentenced as an habitual offender, fourth offense, MCL 769.12. Plaintiff concedes this point on appeal.

The prosecution is required to file a notice of intent to seek enhancement of a defendant's sentence and serve notice on the defendant and his attorney. MCL 769.13. Failure to follow the requirements of MCL 769.13 violates a defendant's right to due process under the Michigan and United States Constitutions. *People v Walker*, 234 Mich App 299, 314; 593 NW2d 673 (1999). The presentence report indicates that defendant's sentencing guidelines score was enhanced because he was classified as an habitual offender, fourth offense, and, at sentencing, the trial court sentenced defendant as a habitual offender, fourth offense. Plaintiff concedes that it did not file the required notice of intent, thus precluding sentencing defendant as an habitual offender. MCL 769.13; *People v Bollinger*, 224 Mich App 491, 492; 569 NW2d 646 (1997). While defendant's minimum sentences of 25 years for each conviction are within the corrected guidelines range of 225 to 375 months, the maximum sentences for the convictions of delivery of 450 or more but less than 1,000 grams of cocaine, and delivery of 50 or more but less than 450 grams of cocaine exceed the statutory limits of 30 years and 20 years, respectively. Consequently, defendant must be resentenced. MCL 769.34(10); *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997) (a sentence is invalid if it is based on inaccurate information, or is beyond statutory limits).

We affirm defendant's convictions, but remand for resentencing. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Richard A. Bandstra
/s/ Brian K. Zahra